No. 11,418

United States Circuit Court of Appeals

For the Ninth Circuit

LAWRENCE WAREHOUSE COMPANY (a corporation),
Appellant,
vs.
DEFENSE SUPPLIES CORPORATION,
Appellee.

CAPITOL CHEVROLET COMPANY (a corporation),
Appellant,
vs.
DEFENSE SUPPLIES CORPORATION,
Appellee.

V. J. McGREW,
Appellant,
vs.
DEFENSE SUPPLIES CORPORATION,
Appellee.

DEFENSE SUPPLIES CORPORATION,
Appellant,
vs.
CLYDE W. HENRY,
Appellee.

Petition of Appellee Defense Supplies Corporation and Reconstruction Finance Corporation for a Rehearing

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To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee, Defense Supplies Corporation and Reconstruction Finance Corporation hereby petition the Court

for a rehearing of their motion for the substitution of Reconstruction Finance Corporation as appellee in the place of Defense Supplies Corporation, and the motion of appellants, Lawrence Warehouse Company and Capitol Chevrolet Company for dismissal of the action, upon the ground that the Court erred in its decision on said motions in the following respects:

I.

THE COURT ERRED IN CONSIDERING THE FAILURE TO SUBSTITUTE A MATTER OF JURISDICTION RATHER THAN OF PROCEDURE.

The Court's decision is based on the contention that the failure to substitute Reconstruction Finance Corporation as a party within the twelve-month period provided for in the Act dissolving Defense Supplies Corporation (59 Statutes 310) deprived the Trial Court of jurisdiction to render judgment. The majority of this Court hold that in spite of the fact the issues were framed and all testimony taken prior to the dissolution of plaintiff, the mere failure to substitute made the Trial Court powerless to render judgment. The majority of this Court further hold that this Court is now powerless to remedy the defect by substituting the proper party plaintiff. This holding is made in spite of the fact that the Act of dissolution expressly provides against abatement. The Court has read into the Act a provision that, in the event substitution is not made, then both the trial court and the appellate court lose all power to act in the matter except to dismiss the action, and such loss of power relates back to the date of dissolution. It is submitted that the Act

contains no such provision and that Congress could not have intended such a result.

By the passage of the Act Congress intended to and did provide for the continued existence of the dissolved corporation for the purpose of litigation. Congress further provided for a procedure to be followed to obtain substitution of parties and gave the court the power to dismiss an action where the necessity for its continuance to determine the issues is not shown. The Act contains no provision depriving the trial court or this Court of the power to act in the event the procedure for substitution is not followed.

The plaintiff, Defense Supplies Corporation, having been continued in existence for the purpose of litigation, and the Trial Court having seen fit to render judgment in its favor, that judgment cannot now be declared void because of lack of jurisdiction, nor can the Act, by any stretch of the imagination, be considered to deprive this Court of the power to remedy the defect of failure to substitute, a power which this Court has under the provisions of Section 777 of Title 28 of the *United States Code*. If Congress had intended such a result, it is only reasonable to say that it would have expressly so provided in the Act of dissolution. It should be borne in mind that whether or not any substitution is made, the real party in interest remains the same, i.e., the United States. We are dealing here with two agencies of the United States, and the substitution of one for the other is in substance the substitution of names only, the real party plaintiff remaining the same.

The majority of the Court stress the provision of the Act of dissolution providing that Reconstruction Finance

Corporation shall perform the functions of Defense Supplies Corporation. This provision would be of some importance if we were dealing with the issue of whether certain functions can be exercised by Reconstruction Finance Corporation. There is no such issue here, however. The issue is whether or not the judgment of the Trial Court is a valid one. Whether or not the wrong party defended the judgment can have nothing to do with the validity of the judgment, which was entered by the Trial Court while the corporate plaintiff still had existence, at least for the purpose of preserving its status as a party.

The majority of the Court also state that if the failure to substitute is a matter of procedure only that can be disregarded, then the failure to file a notice of appeal is also a mere matter of procedure and can be disregarded. (See bottom of page 3 of this Court's Opinion.) It has long been held of course that the failure to file a notice of appeal within the time allowed by statute deprives the appellate court of jurisdiction to hear the appeal. This is the interpretation of an entirely different statute involving different considerations. The two cases are not comparable and a decision with regard to one can have no bearing on the other.

The majority of the Court misstate the ruling in *Reardon v. Balaklala Copper Co.*, 193 Fed. 189. (See page 4 of this Court's opinion.) In regard to that case the majority state that "No question of substitution of the personal representative was discussed and it was assumed that the father under the California law had the right to bring the action." This is in error, as the sole issue in that case was whether it was proper to substitute the

personal representative as party plaintiff in the place of the father. That case is direct authority that a substitution can be made where the action is maintained by the wrong party without requiring the dismissal of the action and the filing of a new suit. In other words, it is direct authority that under circumstances similar to the present case, substitution is a matter of procedure only and not jurisdictional.

II.

THE COURT ERRED IN CONSIDERING DEFENSE SUPPLIES CORPORATION NON-EXISTENT AT THE TIME JUDGMENT WAS ENTERED.

The admitted facts are that the Act dissolving Defense Supplies Corporation became effective on July 1, 1945, that judgment was rendered by the Trial Court on April 15, 1946, and that the twelve-month period within which to move for substitution expired on July 1, 1946. Even though we assume, for the purpose of argument, that the Act can be construed to discontinue the life of Defense Supplies Corporation after the expiration of the twelve-month period, there can be no doubt that its life was continued at least until July 1, 1946. The decision of this Court necessarily construes the Act to mean that Defense Supplies Corporation ceases to exist for all purposes on July 1, 1945, unless a motion for substitution is made within twelve months after that date, in which event the corporation springs to life again for the purpose of validating all acts prior to the substitution. This is a strained construction and gives no effect to the express

provision of the statute against abatement. Congress must have intended that the life of the dissolved corporation continues at least for the twelve-month period for the purpose of litigation. During that period the Trial Court in this case rendered judgment in favor of an existing corporation, and such act on the part of the Court was not a nullity. At the time of the judgment the corporation was, by the express provisions of the statute, in existence for purposes of litigation. The fact that it may have later died may affect the right to appeal, but cannot invalidate the judgment theretofore validly made. In this connection we refer to the dissenting opinion of Judge Healy (page 17 of the Court's opinion) where he states "in any view of the statute, there was no lack of a party plaintiff" and to the decision of the Eighth Circuit in *Gaynor v. Metals Reserve Company* (.....F. (2d) ....., decided March 25, 1948).

III.

THE COURT ERRED IN DISREGARDING APPELLANTS' WAIVER OF THE ERROR.

It is admitted that the failure to substitute was not questioned by appellants at the time the judgment was taken, at the expiration of the twelve-month period, or at any time prior to the decision of this Court on the merits of the appeal. The majority of this Court, however, hold that in spite of the inaction of appellants in this regard, in spite of the fact that the appellants who are charged with knowledge of the Act of dissolution, chose to argue the appeal and submit it to this Court

on its merits, and in spite of the fact that no prejudice whatever has been shown or even claimed, the appellants, having lost the appeal on its merits, nevertheless retain the right to have the case dismissed because of the failure to substitute. In so holding, the Court relies on *United States v. Curran,* 276 U.S. 590. But in that case, like in each of the others relied upon by the Court, the issue of waiver was not even mentioned and apparently had not been raised. It may be that in the *Curran* case there were other circumstances that prevented the possibility of waiver, but we cannot determine this as the subject is not discussed.

The majority of this Court in their opinion discuss the case of *Fix v. Philadelphia Barge Company,* 290 U.S. 530, at some length. That case holds that a similar provision for substitution contained in Section 780 of 28 *United States Code,* is purely remedial, and a failure to comply therewith does not bar a later suit on the same cause of action. The case does not involve the question of the right to substitute after the expiration of the period provided for in the statute, or the question of the remedy of the defect, and those issues are not considered. We are in accord with the holding in the *Fix* case and have not contended and do not now contend that the cause of action against appellants is barred. Reconstruction Finance Corporation can file suit again, subject of course to the defense of the statute of limitations. It is hard to imagine, however, a more useless and time-wasting procedure in view of the fact that the issues have already been presented to and determined by the Trial Court and this Court.

This Court's purpose in citing the *Fix* case is apparently to lend weight to its contention that the twelve-month period provided for in the Act of dissolution is in the nature of a statute of limitations. This serves to emphasize the fact that the provision setting up a twelve-month period is not jurisdictional in the sense that the failure to comply therewith automatically deprives the court of the power to act further. The statute of limitations is a bar to the remedy and not to the right of action. Here the failure to substitute is at most, as the majority of this Court carefully point out, a bar to the remedy and not to the right of action. It has long been established that the bar of the statute of limitations can be waived.

W. P. Brown & Sons Lumber Co. v. Commissioner, 38 F.(2d) 425, 429 (C.C.A. 6), aff'd 282 U.S. 283;

Union Sugar Co. v. Hollister Estate Co., 3 Cal. (2d) 740, 744-5;

53 *C. J. S.* 958, et seq.

Yet the majority of this Court hold that the alleged error in the failure to substitute can not be waived. In doing so the majority not only fail to follow their own reasoning but ignore the many cases holding that such an objection, going merely to the abatement of the action, is waived if not punctually raised and the case is allowed to continue.

Trounatine, et al. v. Bauer, Ponge & Co., Inc., et al., 144 F.(2d) 379 (C.C.A. 2);

L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., 128 Fed. 332 (C.C.A 5), certiorari denied 193 U.S. 672;

Mathison v. Payne, Director General of Railroads (Sup. Ct. of N. J.), 119 Atl. 771;

U. S. Ex Rel. Anthony Volpe v. S. D. Smith, 289 U.S. 422, 77 L.Ed. 1298;

Cavers v. Sioux Oil & Ref. Co. (Tex.), 43 S.W. 2d 578;

R. Piel Gin Co. v. Ind. Farmers' Gin Co. (Tex.), 257 S.W. 630.

IV.

THE COURT ERRED IN RELYING ON DECISIONS INVOLVING PUBLIC OFFICIALS WHICH ARE NOT IN POINT HERE.

The majority of the Court rely upon certain decisions of the Supreme Court of the United States which they claim require the dismissal of this action. These decisions are *LeCrone v. McAdoo,* 253 U.S. 217, *Payne v. Industrial Board of Illinois,* 258 U.S. 613, and *United States v. Curran,* 276 U.S. 590. Each of these cases involves an action by or against a public official who resigned his office during the pendency of the action. These cases are not in point for the following reasons:

It has been established that actions by or against public officials are actions by or against them *personally* and the office or the government is in no sense a party (see *U. S. v. Butterworth,* 169 U.S. 600). The usual case is where a suit is brought against a public official to force him to take certain action. A judgment in such an action is directed only against the public official personally, and if he dies or resigns, his successor cannot be punished for disobedience. It was such a case that the court in the

Butterworth case had in mind. In the present case, however, the action is one by an agency or arm of the government for the use and benefit of the United States, which is the real party in interest. The two situations are not in any way comparable. The court in the *Butterworth* case points out the distinction as follows (169 U.S. 600, 603):

> "In *Thompson v. United States,* 103 U.S. 480, the distinction is pointed out between proceedings where the obligation sought be enforced devolves upon a corporation or continuing body, and those where the duty is personal with the officer. In the former case there is no abatement. The duty is perpetual upon the corporation; in the latter, the delinquency charged is personal, and involves no charge against the Government, against which a proceeding would not lie."

The public official cases do not involve the substitution of a successor in interest. Here Defense Supplies Corporation has been dissolved and Reconstruction Finance Corporation, which has succeeded to its property, powers and functions, including the interest of Defense Supplies Corporation in this action, seeks to be substituted. It is comparable to the substitution of the administrator of the estate of a deceased party, or the substitution of an assignee of a cause of action for the assignor. Thus, if a public official dies and it is sought to substitute the administrator of his estate, we would have a comparable situation. But there is an entirely different situation where it is sought to substitute a successor in office of a public official, as this involves the bringing in of a party who has otherwise no interest in the action. The present case is comparable to *Fleming v. Goodwin,* 165 F.(2d) 334

(C.C.A. 8) and *United States v. Koike,* 164 F.(2d) 155 (C.C.A. 9), wherein the courts, including this Court, decided that a substitution is permissible where the United States is the real party in interest.

For the foregoing reasons it is respectfully requested that a rehearing of the motion of Reconstruction Finance Corporation to be substituted for Defense Supplies Corporation and the motion of appellants to dismiss the action be granted.

Dated: May 5, 1948.

Respectfully submitted,

THEODORE R. MEYER,
BROBECK, PHLEGER & HARRISON,
Attorneys for Reconstruction Finance Corporation and Appellee Defense Supplies Corporation.

CERTIFICATE OF COUNSEL

We hereby certify that in our judgment the foregoing petition for rehearing is well founded and is not interposed for delay.

THEODORE R. MEYER,
BROBECK, PHLEGER & HARRISON.

Due service and receipt of a copy of the within is hereby admitted this.....day of May, 1948.

.....

Attorney for Appellant